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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 990

W. S. DICKEY CLAY MANUFACTURING COMPANY

v.

WILLIAM H. CORDER, d/b/a W. H. C. TRUCKING COMPANY

PETITION FOR WRIT OF CERTIORARI

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WILLIAM H. CORDER, d b a W. H. C. TRUCKING COMPANY

PETITION FOR WRIT OF CERTIORARI

The W. S. Dickey Clay Manufacturing Company hereby applies for a writ of certiorari to the United States Court of Appeals, Fifth Circuit, in No. 19,364, W. S. Dickey Clay Manufacturing Company v. William H. Corder, d b a W. H. C. Trucking Company.

OPINIONS BELOW

The opinion by the Circuit Court is reported at 310 F. 2d 764 and is appended hereto. The decision of the District Court was not reported but it appears at Page 396 of the transcript of record.

JURISDICTIONAL GROUNDS

The Circuit Court of Appeals decided four important state questions contrary to Texas state statutes as construed by Texas courts and by this Court. The decision is contrary to long established state policy and, if allowed to stand, will impair the integrity of the Texas transportation regulatory system. Federal statutes are not involved.

The decision and judgment were rendered on November 30, 1962, and entered on same date. Petitions for rehearing were filed by both parties and were denied on January 15, 1963. The order of denial was entered on same date. On January 24, 1963, the issuance of mandate was stayed for 30 days to enable appellant to apply for a writ of certiorari. That order was entered January 28, 1963. On February 20, 1963, the issuance of mandate was further stayed until April 10, 1963. That order was entered on same date.

The jurisdiction of this Court is conferred by *Title 28, United States Code, Sections 1254 and 2101.*

QUESTIONS PRESENTED FOR REVIEW

1. Under Texas statutes, which give the Railroad Commission of Texas exclusive power to initiate and prescribe all intrastate transportation rates and charges, may a contract carrier motor carrier legally contract with a shipper to transport a commodity for any amount they can agree upon until such time as the Commission prescribes contract motor carrier rates on the commodity involved?

2. Under Texas statutes and court decisions, does the failure of consideration in a written contract render the entire contract void?

3. Under Texas statutes, are suits for additional freight charges not founded on a contract in writing subject to the two-year statute of limitations?

4. Under Texas statutes, are rates and regulations published by common carriers null and void if they do not conform with rates and regulations previously prescribed by the Railroad Commission of Texas?

STATUTES AND REGULATIONS INVOLVED

No federal statutes or regulations are involved in this case. Suit was filed in the United States District Court at San Antonio, Texas, because of diversity of citizenship.

The following Texas statutes and Railroad Commission orders are involved and are quoted in the appendix hereof to the extent relevant:

Vernon's Texas Statutes:

(a) Vol. 18, Article 6448.

(b) Vol. 2, Article 911b, Sections 1(b), 1(g), 1(h), 1(i), 4(a), 6-aa and "declaration of policy" stated in amending Sections 1, 5 and 6 of that article in 1941, reported in fine print at page 701, Title 25, Vol. 2.

(c) Vol. 16A, Articles 5526 and 5527.

Railroad Commission Orders:

(a) Motor Freight Circular 3363, January 12, 1949.

(b) Motor Freight Circular 3641, November 3, 1949.

(c) Contract Carrier Permit No. 10471, October 24, 1949.

(d) Motor Freight Circular 4028, January 31, 1951.

(e) Order approving sale and transfer to Corder March 6, 1952.

STATEMENT OF THE CASE

(a) Physical operations.

The W. S. Dickey Clay Manufacturing Company, hereinafter called "Dickey", manufactures clay pipe at Saspamco, Texas, just south of San Antonio, Texas. It ships that pipe to various cities and towns throughout the State of Texas. Prior to 1949 that pipe all moved by private truck or by railroad (R. 312-313). In July, 1949, one M. E. Cage approached Dickey and offered to transport truckload shipments of clay pipe for the same rates the railroads were charging (R. 309). At that time no truck-load rates on clay pipe had ever been prescribed by the Railroad Commission of Texas and a contract providing for such service was negotiated (R. 50-53).

Cage secured a contract carrier permit from the Railroad Commission (R. 59) based on that contract. In 1952 William H. Corder, hereinafter called "Corder", bought Cage's contract and permit, with Dickey's consent, and continued

to haul Dickey's shipments until November, 1956, under the original Cage contract revised June 1, 1954, to provide increased rates (R. 320-321). Cage and Corder transported for Dickey from one to ten truckloads of clay pipe from Saspamco daily from 1949 through October, 1956 (Plaintiff's Exhibits 25 and 26). Prior to November 1, 1956, no one ever raised any question as to the legality of the rates paid to Cage and Corder (R. 400, 314 and 322).

Corder kept his trailers parked in Dickey's yard at Saspamco. The plant moved the trailers from that location with its own tractor to spots where pipe was stored. Dickey performed the loading at its own expense and placed the loaded trailer in position to be transported by Corder. All trailers were loaded full (R. 99-100). The consignees performed the unloading (R. 352-353). The service performed by Corder was substantially similar to that performed by specialized motor carriers. In fact, after Corder ceased operations in November, 1956, a specialized carrier performed the same service (R. 328).

On or about November 1, 1956, an inspector for the Railroad Commission of Texas told Corder he was not collecting the correct rates (R. 121). Dickey refused to pay more than provided in the contract of June 1, 1954, and Corder discontinued his contract carrier operations (R. 120-124). On February 5, 1958, Corder submitted to Dickey a claim for $693,526.02 covering alleged undercharges on shipments transported from Saspamco to various Texas destinations during the period March 3, 1952, to and including November 2, 1956 (R. 130-138). Dickey refused to pay the claim

and suit for approximately $1,000,000 was filed on March 1, 1958. Judgment was rendered in favor of Corder for $483,292.51 with interest and costs (R. 424).

(b) Texas statutes.

Texas statutes give the Railroad Commission of Texas exclusive power to initiate and prescribe all intrastate freight rates to be assessed and collected by:

(a) Railroads
(b) Regular route common carrier motor carriers
(c) Specialized common carrier motor carriers
(d) Contract carrier motor carriers

The Texas Legislature has never prescribed any rates. Until the Railroad Commission prescribes rates under the power delegated to it by the Legislature, carriers may assess and collect such rates as they and their shippers can agree upon. When the Commission prescribes rates on certain commodities for specified carriers, no carrier can change those rates by tariff publication or otherwise. Tariff provisions which do not conform with the Commission's previous orders are null and void and have no effect.

Texas had no statutory regulation of intrastate transportation rates until 1891 when the Railroad Commission of Texas was given exclusive power to initiate and prescribe all common carrier railroad rates (Vol. 18, Section 6448, Appendix 45). In 1929 the Railroad Commission of Texas was given the same power over common carrier motor carrier rates (Vol. 2, Art. 911b, Section 4(a), Appendix

page 49). In 1931 the Commission was given the same power over contract carrier motor carriers, except that the Texas Legislature provided that the prescribed contract carrier rates should not be less than the rates previously prescribed for common carrier motor carriers performing substantially similar service (Vol. 2, Art. 911b, Section 6-aa, Appendix Page 49). That section contained the following language, quoted by the Circuit Court on page 10 of the appendix herein:

> "the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

On June 6, 1941, the Texas Attorney General ruled that the "common carriers" referred to above included both rail and highway common carriers (Defendant's Exhibit No. 5). In 1941 the Texas Legislature created a new class of common carrier motor carriers known as "Specialized Carriers" and the Commission was given exclusive power to initiate rates for those carriers (Vol. 2, page 701, Appendix Page 48).

It has long been the custom in Texas for motor carriers to charge whatever they and their shippers can agree upon until such time as the Railroad Commission prescribes a rate for the service to be performed.

(c) Railroad Commission orders.

The Railroad Commission has prescribed rates on all classes and commodities that are transported within Texas by common carrier railroads and by regular route common

carrier motor carriers. It has also prescribed rates on most commodities transported by specialized common carrier motor carriers but it has not yet prescribed specialized common carrier motor rates on road building materials (R. 363). Contract motor carrier rates have been prescribed on many commodities but only five of fifteen Commission tariffs prescribed for specialized common carrier motor carriers apply to contract carriers performing substantially the same service (R. 271).

The District Court refers to Motor Freight Circular No. 2732 (R. 411), erroneously shown as No. 273, to show that the Railroad Commission of Texas prescribed volume rates and ratings December 6, 1943, which were prescribed as minima for contract carriers. That language was quoted with approval by the Circuit Court (Appendix 32-33). But none of those rates or ratings applied on truck-load shipments of clay pipe.

The District Court also referred to Motor Freight Circular 3363 January 12, 1949, which approved SWMFB Tariff 25, issued January 14, 1949, effective March 1, 1949, and it infers that such approval applied to subsequent reissues of that tariff (R. 411-412). The ordering paragraph of that Circular reads as follows:

> "It is ordered by the Railroad Commission of Texas that Southwestern Motor Freight Bureau, Inc., Texas Tariff No. 25, issued by J. D. Hughett, Agent, naming rates, rules and regulations governing transportation of property by common carrier motor carriers, and as minimum for contract motor carriers, be, and the same is hereby approved and adopted for application intrastate in Texas as provided therein."

It is clear that the approval runs only to Tariff 25, proof copies of which had been submitted to and examined by the Railroad Commission of Texas. It did not approve Tariffs 25-B, 25-C, 25-D, or 25-E cited by the Circuit Court on page 34 of Appendix herein. Tariff 25 did not contain any truck-load rates on clay pipe and it was not subject to any classification which provided a truck-load rating on such pipe.

The first time the Railroad Commission of Texas prescribed any motor carrier truck-load rates on clay pipe was in M. F. Circular 3641, effective November 12, 1949 (Defendant's Ex. 10). That order prescribed truck-load clay pipe rates for specialized common carriers only. Contract carriers were not mentioned in that order. See Page 53 Appendix herein.

On January 31, 1951, the Railroad Commission of Texas issued its Motor Freight Circular 4028, adopting American Trucking Associations, Inc., National Motor Freight Classification No. 11, effective March 6, 1951, which became Railroad Commission Classification No. 1. That classification named truck-load ratings on clay pipe for regular route common carrier motor carriers but it contained no ratings for contract carriers. See page 55, Appendix herein. The order was issued on request of the tariff publishing agent for the regular route common carriers and did not affect contract carriers. Tariff No. 25 was no longer in effect when that order was issued. Tariff 25 was cancelled June, 1950, nearly one year before Classification No. 11 (R. C. T. No. 1) became effective.

No rate orders affecting truck-load shipments of clay pipe transported by contract carrier motor carriers were ever issued by the Railroad Commission of Texas prior to November 2, 1956. Motor Freight Circular 5044 (Plaintiff's Exhibit No. 46-b), was issued October 14, 1953, and Motor Freight Circular No. 6711 (Plaintiff's Exhibit 48-b) was issued June 21, 1955. They simply approved later classifications published by the regular route common carriers. Neither those orders nor the approved classification ratings applied to contract carrier motor carriers.

(d) Court decisions.

The conclusions of the District Court and the Circuit Court in this case are based on Railroad Commission orders contained in Motor Freight Circulars 2732 (Plaintiff's Ex. 30-b) and 3363 (Plaintiff's Ex. 34) and on seven regular route common carrier motor freight tariffs, all of which were received in evidence over Dickey's objections (R. 171, 176, 192). Quotations on pages 32 and 33 of the appendix herein extracted from Circular 2732 are incomplete. They fail to show that Circular 2732 (erroneously referred to as 273) applied only to the commodities named on pages 7 and 8 of that circular and that clay pipe is not named on those pages or in that circular (Plaintiff's Exhibit 30-b). That circular did not affect common carrier motor carrier rates or contract motor carrier rates on truck-load shipments of clay pipe.

The Distict Court made the following statement concerning the order in M. F. Circular 3363:

> "Each tariff of the SWMFB Tariff No. 25 Series, above referred to, provided on its face that the rates provided for in said tariff are applicable to 'common carrier motor carriers and as a minimum by contract motor carriers' and showed on its face that it was to be used in connection with the appropriate National Motor Freight classification." (R. 413.)

That statement was quoted with approval by the Circuit Court (Appendix, page 34). Both courts followed the provisions of the Interstate Commerce Act which allows carriers to initiate rates. The language contained in interstate tariffs filed with the Interstate Commerce Commission is binding on carriers and shippers unless previously suspended by the Commission. That rule is not applicable on Texas intrastate shipments.

The District Court referred to the fact that the Commission found on October 29, 1949, that the Cage operation was:

> "more substantially similar to that of a common carrier motor carrier" and that the minimum rate to be charged by Cage should not be less than "that charged by common carrier motor carriers under the rates fixed by the Railroad Commission." (R. 398.)

A similar clause was contained in Cage's permit and in Corder's permit. That language was quoted by the Circuit Court at page 24 of Appendix herein. However, neither court seems to have considered that clause in its decision and judgment. The specialized common carrier rates were not

prescribed until November 12, 1949, and the regular route common carrier rates were not prescribed until January 31, 1951.

The foregoing clauses were inserted in contract carrier permits shortly after Section 6-aa was enacted in 1931. At that time we had only one class of common carrier motor carriers (R. 292-297). After specialized common carriers were created in 1941, those clauses became meaningless because we then had two classes of common carriers and the clauses did not indicate which class was referred to (R. 297). The regular route common carriers are the merchandise carriers which operate between fixed terminals on regular schedules via specific routes (R. 282-286). They do not and cannot transport truck-load shipments of clay pipe like Corder handled (R. 354).

Specialized carriers perform substantially the same service as Corder performed (R. 327-328). If the clauses quoted on page 4 of the Circuit Court decision have any effect on contract carrier rates, they must be construed to require that Motor Freight Circular 3641 rates (Appendix, page 58) are to be observed as minimum by Corder. The charges already paid by Dickey exceed the charges based on rates prescribed in Circular 3641.*

*Plaintiff's Exhibit 26, pages 113 to 153, inclusive, show that Dickey paid $113,566.09 freight charges during the period March 1, 1956, through November 2, 1956. The charges based on rates prescribed in Circular 3641 would have amounted to $77,504.32 or $36,061.77 less than already paid.

QUESTIONS OF PUBLIC IMPORTANCE

As found by the trial court, Corder and Dickey entered into their contracts in good faith, both believing at that time that no truck-load clay pipe rates for contract carriers had ever been prescribed by the Railroad Commission of Texas and that the rates and charges contracted for were legally applicable (R. 423). All sales by Dickey during the seven-year period included delivery and the delivered prices were based on the rates contracted for. All charges provided for in those contracts have been paid in full (R. 422). If Dickey now has to pay an additional charge exceeding ½ million dollars, it will be a matter of great concern and work great hardship on Dickey. But the District Court and the Circuit Court of Appeals have ignored Texas court rulings of long standing and they have misconstrued this Court's decision in *Steele v. General Mills, 329 U. S. 433 (1947)*. That is of much greater importance to Texas carriers and shippers in general. It is extremely important that this Court take steps to clarify the situation.

Prior to 1891 there was no transportation regulation on strictly intrastate shipments within Texas. The carriers and shippers could contract for any charges on which they could reach agreement. In 1891 the Railroad Commission of Texas was given the exclusive right to initiate and prescribe all railroad rates. After the rates were prescribed no carrier could revise or amend the prescribed rates by tariff publication. In 1903 the Texas Supreme Court held in *Railroad Commission of Texas v. Weld & Neville, 96 Tex. 394,*

73 S. W. 529, that the Commission had the exclusive power to initiate rates. That is quite different from the requirements of the Interstate Commerce Act.

In 1929 the Texas Legislature gave the Railroad Commission the exclusive right to initiate and prescribe common carrier motor rates in Texas. In 1931 it gave it the exclusive right to initiate and prescribe contract carrier motor rates in Texas. In 1941 it gave the Commission the exclusive right to initiate and prescribe rates for a new class of common carrier motor trucks to be known as specialized carriers. But many of the contract motor carrier rates and some specialized carrier rates have not yet been prescribed (R. 271, 363). The Legislature prescribed no rates. It only set some guides to be followed by the Commission when it prescribed rates. Until the Commission actually prescribes rates to be observed by motor carriers, the shippers and carriers may continue to contract for the use of such charges as the parties may agree upon.

The Circuit Court of Appeals held in the case at bar that carriers cannot transport goods for agreed rates, even though the Commission has not prescribed any rates for that service. It holds that carriers can by publication in their tariffs amend and revise the application of rates previously prescribed by the Commission. It further holds that a suit based on an alleged statutory obligation is subject to the four year statute of limitation, even though the suit is not founded on a written contract. This latter holding apparently ignores the well-settled rule in Texas that failure of consideration on which a contract is founded voids

the entire contract. Those holdings run counter to long established policy in this state. If they are not reviewed and corrected by this Court, they will impair the integrity of the Texas regulatory system.

Only two orders prescribing truck-load motor carrier rates on clay pipe were issued prior to November 2, 1956. One was M. F. Circular 3641, issued November 3, 1949, effective November 12, 1949 (Appendix, page 53). The other was M. F. Circular 4028, issued January 31, 1951, effective March 6, 1951 (Appendix, Page 55). Circular 3641 prescribed rates for specialized common carriers only. Circular 4028 prescribed rates for regular route common carriers only. Neither order prescribed any rates for contract carriers. Because the common carrier publishing agent published the latter rate in a tariff on which the agent had printed a statement to the effect that rates in that tariff are applicable to:

> "common carrier motor carriers and as a minimum by contract motor carriers" (Appendix, page 34),

the District Court concluded that the rates named in that tariff on clay pipe should apply as minimum for contract carriers. The Circuit Court quoted that language with approval.

In *General Mills v. Steele, 5th Cir., 154 F. 2d 367 (1946)*, the Circuit Court permitted a contract carrier to disregard rates previously prescribed on merchandise to be observed as minima by all contract carriers. Judge Hutcheson, who is familiar with Texas statutes and decisions, dissented. In *Steele v. General Mills, 329 U. S. 433 (1947)*, this Court

granted a writ of certiorari because it appeared that the transportation policy of Texas was in jeopardy. In that case it was admitted by all parties that the Railroad Commission of Texas had prescribed certain rates on the merchandise involved and that the contract carrier had collected charges different from those based on the prescribed rates.

In that case this Court properly approved a finding by the District Court that the suit was based on a written contract, that the four-year period of limitation applied and that the later agreement to apply rates that did not conform with rates previously prescribed by the Commission was null and void. Judgment of the Circuit Court of Appeals was reversed. In this case the District Court and the Circuit Court both apparently thought they were following the principles set forth in the *Steele Case* but they overlooked the fact that there is no evidence of record indicating that the Railroad Commission ever prescribed a truck-load rate on clay pipe to be observed by contract carrier motor carriers.

The sole basis for holding that the truck-load rates prescribed January 31, 1951, are applicable to contract carriers is that the regular route common carriers' publishing agent included the new rates in a tariff which already showed on its face that the rates named therein applied as minimum for contract carriers (Appendix, page 34). M. F. Circular 4028 did not so provide (Appendix, page 55). This Court held in the *Steele Case* that carriers cannot, by publication or otherwise, vary the rates and regulations prescribed by the Railroad Commission of Texas.

The District Court held that the four-year statute of limitation was applicable in this case and cited the *Steele Case* as authority. That holding was approved by the Circuit Court (Appendix, pages 37-40). The suit in the *Steele Case* was founded on a valid written contract. The attempted amendment to that contract, by which the carrier sought to vary the rates prescribed by the Railroad Commission of Texas, was properly held by this Court to be void. If that ruling was correct, the contract between Dickey and Corder would be void unless it conformed with any rates which had been previously prescribed by the Commission on truck-load shipments of clay pipe.

The District Court held that Dickey had an "implied obligation" to pay rates that had previously been prescribed by the Railroad Commission and that the four-year statute applied (Appendix, Page 38). The Circuit Court declined to decide the "implied obligation" question (Appendix, Page 39). But it approved the four-year limitation statute because the contract provided that the carrier "would comply with all lawful rules, regulations and orders required of a contract carrier by the Railroad Commission" (Appendix, Page 39). The holdings of both courts ignored the fact shown by the record that the Railroad Commission has never prescribed any truck-load rates on clay pipe to be observed by contract carrier motor carriers.

Texas courts hold that, if the consideration on which a contract is based is illegal and void, the entire contract is void. See *Memphis v. Browder*, 4 S. W. 2d 614, and R. 495-497 for a discussion of that rule. If the Railroad Commis-

sion prescribed a truck-load rate on clay pipe and the consideration clause was illegal and void, as claimed by Corder, then the entire contract was void. The two-year statute of limitation would be applicable under Article 5526 (Appendix, Page 50).

CONCLUSION AND PRAYER

For the foregoing reasons we respectfully pray that a writ of certiorari be granted. The printed record herein, including the proceedings in the Circuit Court, is enclosed herewith. The original exhibits considered by the Circuit Court are being forwarded under separate cover.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Frank A. Leffingwell, an attorney of record for petitioner, do hereby certify that I have this day served copies of the foregoing petition and appendix on attorneys for Corder by sending by first class U. S. Mail:

2 copies to Mr. James F. Gardner, Petroleum Center, B-112, 900 N. E. Military Drive, San Antonio 5, Texas.

1 copy to Mr. James P. Hart, 904 Brown Building, Austin 1, Texas.

I am also sending 1 copy for information to Mr. Edward W. Wadsworth, Clerk of the Fifth Circuit Court, New Orleans 30, Louisiana.

Witness my hand at Dallas, Texas, this 29th day of March, 1963.

FRANK A. LEFFINGWELL

APPENDIX

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19364

W. S. DICKEY CLAY MANUFACTURING COMPANY,
Appellant,

versus

WILLIAM H. CORDER,
d/b/a W. H. C. TRUCKING COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Texas,

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(November 30, 1962)

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

RIVE, Circuit Judge: This appeal is from a judgment for $483,292.51, plus interest and costs, in favor of the appellee, Corder, against the appellant, Dickey. The action was filed March 1, 1958, and the claim was for undercharges on shipments of clay pipe transported by Corder

from Dickey's plant at Saspamco, Texas, to various points in Texas from March 3, 1952 to November 2, 1956. Upon the theory that the Texas four-year statute of limitations applied, Corder eliminated from his claim all shipments originating prior to March 2, 1954.

Corder claimed that the Railroad Commission of Texas had prescribed rates applicable to the shipments substantially greater than the rates charged to and paid by Dickey. Dickey denied that the Railroad Commission of Texas had prescribed rates applicable to the hauling of the clay pipe. In the alternative, Dickey urged that if any such rates had been prescribed they were lower than those paid to Corder. Dickey further insisted that the Texas two-year statute of limitations applied.

The case was tried to the court without a jury. The district court made extensive findings of fact and conclusions of law in the form of a 28-page unreported memorandum decision, and entered a judgment for Corder against Dickey, which, with interest and costs, now amounts to over half a million dollars.

On this appeal there is no attack upon the following findings of fact made by the district court:

> "Dickey, at all times pertinent hereto, was engaged in the operation of several manufacturing plants manufacturing burned clay products. One of these plants was located at Saspamco, Texas. The plant at Saspamco manufactured and sold clay pipe for use in Municipal, County and State projects, with about eighty to ninety per cent of its pipe being shipped direct to municipal organizations. Prior to 1949 all pipe manufactured at

Saspamco was shipped by Dickey either by railroad in carload quantities or by private trucks.

"Early in 1949 M. E. Cage, President of the Cage Trucking Company, approached Dickey's San Antonio representative with a proposal to transport truck load shipments of clay products from Saspamco to Texas destinations at the then existing rail carload rates. After some negotiations the Cage Trucking Company, referred to hereinafter as Cage, and Dickey entered into a contract in writing on July 12, 1949, under the terms of which Cage, as a contract carrier, was to transport by truck Dickey's burned clay products from its plant at Saspamco to Dickey's customers at such locations or destinations in the State of Texas as Dickey might from time to time direct or require. That contract provided that the sole compensation for transporting the burned clay products by Cage should be 'the same sum or rate per hundred-weight of quantity in such truckloads' as published or charged by the rail carrier or carriers operating between manufacturer's said plant and the destinations of such deliveries. The contract further provided that Cage would comply with all lawful rules, regulations and orders required of a contract carrier by the Railroad Commission of the State of Texas. On July 28, 1949, Cage filed with the Railroad Commission of Texas an application fo. a contract carrier permit accompanied by the foregoing contract and other information. The Railroad Commission had a hearing on said application on September 26, 1949, after due notice of such hearing and granted said application and on October 24, 1949, issued its Contract Carrier Permit No. 10471 to Cage authorizing Cage to transport by motor truck Dickey's burned clay pipe from its Saspamco plant to any point in the State of Texas. The order of the Railroad Commission granting Cage's application contained the following provision:

> " 'The Commission Further Finds that the service rendered by applicant is more substantially

similar to that of a common carrier motor carrier and the Commission orders that the minimum rate to be charged by the applicant shall not be less than that charged by common carrier motor carriers under the rates fixed by the Railroad Commission.'

"The Contract Carrier Permit No. 10471 issued to Cage contained the following provision:

"'Service Rendered by Applicant is more substantially similar to that of a common carrier motor carrier and the Commission orders that the minimum rate to be charged by applicant shall not be less than that charged by common carrier motor carriers under the rates fixed by the Railroad Commission.'

"The latter part of 1951 Corder, with knowledge that Cage was charging rail carload rates for the clay pipe he was transporting for Dickey, approached Cage with reference to purchasing Cage's contract with Dickey. On March 1, 1952, Cage, with the written consent and approval of Dickey, transferred and assigned its contract with Dickey to Corder, together with Contract Carrier Permit No. 10471 theretofore issued to Cage by the Railroad Commission of Texas. Cage filed an application with the Railroad Commission of Texas for approval of the sale and transfer of said permit to Corder. By order entered on March 4, 1952, the Commission approved the sale and transfer of said Permit No. 10471 to Corder, and on March 7, 1952, the Railroad Commission issued its Contract Carrier Permit No. 10471 to Corder. Said permit issued to Corder contained the identical language with reference to the minimum rates to be charged by the permit holder, above quoted, that was contained in the Permit No. 10471 issued to Cage. Corder immediately began transporting shipments of clay pipe from Dickey's Saspamco plant to various places in Texas at the rail carload rates.

"The original Corder-Dickey contract was to expire by its own terms on November 3, 1954. On or about

June 1, 1954, Corder suggested a new contract with Dickey which was negotiated and made effective on that date. The new contract, which was also in writing, was still based on rail carload rates, but it provided for certain surcharges and a specific rate per hundred pounds to El Paso which was higher than the existing rail carload rate to that destination. This contract likewise contained the provisions to the effect that Corder would comply with all the lawful rules, regulations and orders required of a contract carrier by the Railroad Commission. After the new contract became effective Corder continued to transport truckloads of clay pipe almost daily from Saspamco to various destinations in Texas.

"Prior to November 1, 1956, no one ever raised a question as to the legality of the rates Cage and Corder charged for transporting Dickey's clay products. However on or about November 1, 1956, Guy E. Huddleston, Rate Inspector and Investigator of the Railroad Commission of Texas, conferred with Corder, examined his records and told him that he was not charging the correct rates. Corder had several truckloads of pipe already loaded and several more scheduled for the next day or two, so Huddleston agreed that if Corder would cease hauling under his Permit No. 10471 or charge the correct rate, he would permit him to continue operations for the next day or two in order to effect delivery of what was already obligated. The last clay pipe that Corder transported for Dickey under his Permit No. 10471 was transported on November 2, 1956.

"On November 2, 1956, Mr. Huddleston wrote Jim Gibson, Dickey's General Manager in San Antonio, Texas, relative to checking the records of Corder on the day before and advised Gibson that it was the contention of the Railroad Commission that the rates prescribed in Southwestern Motor Freight Bureau Tariff No. 25-E were the correct rates which a contract carrier should charge for hauling the clay pipe shipped by

Dickey and that the rates being charged by Corder for the hauling of said clay pipe were below the rates prescribed in said Tariff No. 25-E. On November 14, 1956, Mr. Huddleston filed three complaints against Corder and three complaints against Gibson in the Justice Court of Travis County, Texas, charging Corder and Gibson with aiding and abetting in violation of the Motor Carrier Law of the State of Texas on October 1, 3 and 4, 1956, in violation of Article 1690b of the Penal Code of the State of Texas in that they failed to comply with the rules and regulations of the Railroad Commission of Texas as contained in Tariff No. 25-E. These charges obviously grew out of the fact that Corder was not charging the rates prescribed in said Tariff No. 25-E for transporting Dickey's clay pipe. Corder and Gibson were fined and each of them paid the fines assessed against him.

"Shortly after November 1, 1956, Corder purchased stock in Lone Star Trucking, Inc., a specialized motor carrier. That company then applied to the Railroad Commission to fix rates for it as a specialized motor carrier on vitrified clay pipe. On November 13, 1956, the Railroad Commission issued its Motor Freight Circular No. 7362, to become effective November 21, 1956, whereby it gave temporary approval, pending hearing on legal notice, to amending Railroad Commission of Texas Motor Freight Commodity Tariff No. 6-D, the tariff that fixed the rates to be charged by specialized motor carriers between points in Texas, so as to permit Lone Star Trucking, Inc. as a specialized motor carrier, to transport by motor truck Dickey's clay pipe from Saspamco, Texas, to points within the State of Texas at the rates prescribed in said Circular. Thereafter the Railroad Commission, after hearing had on the application of Lone Star Trucking, Inc. for the fixing of rates to be charged by it as a specialized motor carrier on vitrified clay pipe, issued its Motor Freight Circular No. 7530, effective May 27, 1957, canceling its Circular No. 7362 and amending Tariff No. 6-D so as to fix

the rates therein specified as the rates to be charged by Lone Star Trucking, Inc. and other specialized motor carriers for the transportation of clay pipe within the State of Texas. On or about November 21, 1956, Lone Star Trucking, Inc., operating as a specialized motor carrier, took over the trucks theretofore used by Corder and commenced transporting Dickey's clay pipe to points in Texas performing the same service that Corder had theretofore performed and charged therefor from November 21, 1956, to May 27, 1957, the rates prescribed by Circular No. 7362 and thereafter the rates prescribed by Circular No. 7530.

"For transporting Dickey's clay pipe Cage, during all the time it was transporting said pipe under its contract with Dickey, charged and was paid by Dickey on the basis of the rail carload rates then in effect, and Corder, during all the time he was transporting said clay pipe for Dickey up to and including November 2, 1956, charged and was paid by Dickey the existing rail carload rates. At the time Cage and Dickey entered into the contract under which Cage was to transport Dickey's clay pipe and at all times subsequent thereto that Cage transported said pipe under such contract Cage and Dickey in good faith believed that the charging of the rail carload rates was lawful. From the time Corder took over the Cage contract and started transporting Dickey's clay pipe up to November 1, 1956, Corder and Dickey in good faith believed that the charging of the rail carload rates for the transportation of said clay pipe was lawful.

"Contending that the rates fixed by the Railroad Commission in the SWMFB Tariff 25 Series and the relevant National Motor Freight Classifications were applicable to his transportation of Dickey's clay pipe in Texas, Corder submitted to Dickey on February 5, 1958, a claim for undercharges on the shipments of clay pipe made by Dickey from its Saspamco plant to points in Texas and transported by him from March 3,

> 1952, to and including November 2, 1956. In view of Corder's concession that the Texas four-year statute of limitation is applicable to his claim for undercharges, the Court is no longer concerned in this action with any shipments of clay pipe transported by Corder prior to March 2, 1954."

There is no dispute about the proposition that, under Texas law, payment of Commission-fixed carrier rates is a public obligation which must be enforced regardless of any private contract. *Steele v. General Mills*, 1947, 329 U. S. 433, 440, reversing *General Mills v. Steele*, 5 Cir., 1946, 154 F. 2d 367; *Houston & T.C. R. Co. v. Johnson* (Tex. Com. App., 1931), 41 S.W. 2d 14; *Texas & N.O. R. Co. v. Yates* (Tex. Com. App., 1942), 161 S.W. 2d 1050.[1] Article 1690b, Vernon's Texas Penal Code, makes the violation of or failure to comply with any lawful order or requirement of the commission a misdemeanor.

Dickey does not deny that the Commission had authority, and was under a duty, to prescribe minimum rates to be collected by Corder under Section 6aa of Article 911b, Vernon's Civil Statutes of Texas:

> "Sec. 6-aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

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[1] In its original brief on appeal, Dickey concedes:

> "The trial court properly held that any agreement whereby the carrier is to charge and the shipper is to pay rates less than the rates fixed for that carrier by the Railroad Commission is void and cannot be changed by contract."

Article 911b, Sec. 20 of Vernon's Civil Statutes of Texas provides for direct review by the District Court of Travis County of decisions of and rates prescribed by the Commission. That being true, it is settled that if the Commission has in fact prescribed minimum rates, they are not subject to collateral attack. *Steele v. General Mills*, 1946, 329 U. S. 433, 439, and Texas authorities cited in footnote 2; *Thompson v. Railroad Commission* (Tex. Sup. Ct., 1951), 240 S.W. 2d 759.

As has been stated, the order of the Commission granting Corder's application for a contract carrier permit, and the order granting the permit to his predecessor, Cage, each provided "that the minimum rate to be charged by applicant shall not be less than that charged by common carrier motor carriers under the rates fixed by the Railroad Commission." Corder insists that this order is couched in such ambiguous terms as to be meaningless, and that, if it has any effect, it prescribes as a minimum rate the lower of two common carrier motor carrier rates in effect at the time these shipments moved. In resolving those contentions the district court reviewed the legislative history of the Texas statutes regulating motor carriers, as follows:

> "In 1929 the Legislature of Texas for the first time enacted legislation pertaining to regulation of motor carriers (Chapter 314, Act, 41st Legislature, Regular Session, page 698, House Bill No. 654). Section 1 of that Act defined two classes of motor carriers. Class 'A' carriers were defined as those operating 'over fixed routes and under regular schedules and having fixed termini and receiving compensation or hire for such service under published rates and tariffs.' Class 'B'

carriers were defined as those who have no fixed routes, regular schedules or fixed termini or published rates.' Section 2 of the Act declared that all motor carriers are 'common carrier.' Section 3 of the Act provided that certificates of convenience and necessity would be issued to Class 'A' carriers, and Section 6 provided that permits would be issued to Class 'B' carriers.

"In 1931 the Legislature enacted House Bill 335 (Chapter 277, Acts, 42nd Legislature, Regular Session, page 480). Most of the provisions of Article 911b that were contained in said statute at the time of the Cage-Dickey contract and the Corder-Dickey contract were the same as originally enacted in the 1931 statute. The 1931 Act, by amending Section 1 of the 1929 Act, abolished the designations of motor carriers as Class 'A' and Class 'B' carriers. It does not define 'common carriers' but defines a 'contract carrier' to mean any motor carrier other than a common carrier. Section 5 of the 1931 Act is the same as Section 5 of Article 911b and provides for the issuance of certificates of convenience and necessity to common carriers, and Section 6 of the 1931 Act is the same as Section 6 of Article 911b and provides for the issuance of permits to contract carriers. However, paragraph (d) of Section 6 of the 1931 statute provided that upon application the Railroad Commission could grant a special permit to a person to engage in the business of transporting over the highways of Texas certain named types of freight, which in general are the same types of freight which are now listed in the statutory provisions relating to 'specialized motor carriers,' such permits to be issued 'upon such terms, conditions and restrictions as the Railroad Commission may deem proper.'

"In 1941 the Legislature enacted House Bill No. 351 (Chapter 442, Acts, 47th Legislature, Regular Session, page 713) amending Article 911b. The amendment left in effect the provisions of the 1931 Act with regard to 'common carriers' and 'contract carriers.' However it

added provisions with regard to 'specialized motor carriers' to take the place of the carriers having special permits to haul certain commodities under the provision of paragraph (d) of Section 6 of the 1931 Act. The emergency clause of the 1941 Act (Section 7) provides that 'under the present law the carriers of the special commodities and the class of commodities named herein are not regulated with regard to the general welfare' and the principal purpose of the statute appears to be to set up statutory requirements for obtaining certificates of convenience and necessity for the special commodities carriers, who thereafter were to be known as 'specialized motor carriers.' Since they were to be a class of carriers who were engaged in transportation over the public highways, for compensation and for the general public, specialized motor carriers were declared to be a class of common carrier motor carriers. However specialized motor carriers were distinguished from common carrier motor carriers in that special requirements for the issuance of certificates to specialized motor carriers were provided by a new section to be known as Section 5a, which is now Section 5a of Article 911b.'

"The foregoing summary of the legislative history of the statutes regulating motor carriers shows the evolution of the statutory classifications of motor carriers to where at this time and at all times pertinent hereto there are three classes of motor carriers regulated by the Railroad Commission, namely, contract carriers (Section 1(b), Article 911b), specialized motor carriers (Section 1(i), Article 911b), and those motor carriers who operate as common carriers for the transportation of property for compensation or hire over the public highways of Texas after first obtaining from the Railroad Commission a certificate that the public convenience and necessity requires such operation as provided for by Section 5, Article 911b. The last mentioned class of motor carriers is generally and commonly referred to by the Railroad Commission and those engaged in the business of motor carriers as common carrier motor

carriers. Each of the three classes of motor carriers has certain similarities and certain differences when compared with the other classes of motor carriers."

In equally thoroughgoing fashion, the district court then examined with meticulous care the various rate orders of the Railroad Commission and the approved tariffs, as follows:

"An examination of the various rate orders of the Railroad Commission offered in evidence reflects that ever since 1931 the Railroad Commission has adopted and approved tariffs fixing rates for common carrier motor carriers and fixing such rates as fixed for common carrier motor carriers as the minimum rates for contract carriers.

"Railroad Commission General Order No. 25, dated August 22, 1931, reciting that the 1931 statute imposed the duty on the Railroad Commission to prescribe minimum charges for contract carriers provides that contract carriers should 'observe and apply as minimums' until further orders of the Commission, the rates prescribed by Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, as amended.

"Railroad Commission Class and Commodity Tariff No. 1-A, which cancels Tariff No. 1, referred to above, provides 'rates, ratings, rules and regulations governing the transportation of property by common and contract carriers between points in Texas.'

"Motor Freight Circular No. 2073, dated July 29, 1939, added a provision to Tariff 1-A, designated Item 470, providing that the tariff should be observed by common carriers and 'by contract motor carriers as minimum, on intrastate traffic, unless permits issued by the Commission provide to the contrary.'

"Motor Freight Circular No. 273, dated December 6, 1943, prescribing volume rates and ratings for common

carrier motor carriers and as minimum for contract carriers, and amending Tariff No. 1-A, contains the following specific provision:

" 'That the volume rating, minimum rates and rules governing the same, published in National Motor Freight Classification No. 7 (West), R.C.T. No. 8, be applied by common carrier motor carriers and as minimum by contract motor carriers, intrastate in Texas.'

"This circular further provides:

" 'It is further provided that the rates, rules, regulations and tariff amendments prescribed by our orders above herein be applied (a) by all common carrier motor carriers operating under common carrier certificates intrastate in Texas, and (b) as minimum by all contract carrier motor carriers operating under contract carrier certificates intrastate in Texas.'

"On January 12, 1949, the Railroad Commission adopted Motor Freight Circular No. 3363 which canceled Tariff 1-A, above referred to. This Circular provides that 'an agency of the common carrier motor carriers' will issues a tariff 'to be supplemented from time to time as changes therein may be made by our orders' and further provides:

" 'It is ordered by the Railroad Commission of Texas that Southwestern Motor Freight Bureau, Inc., Texas Tariff No. 25, issued by J. D. Hughett, Agent, naming rates, rules and regulations governing the transportation of property by common carrier motor carriers, and as minimum for contract motor carriers, be, and the same is hereby approved and adopted for application intrastate in Texas as provided therein.'

"The tariffs of the SWMFB Tariff No. 25 Series and the Motor Freight Classifications, which were in effect during the time that Corder transported the clay products for Dickey were offered in evidence. Those tariffs and classifications, together with the circulars of the

Railroad Commission pertaining thereto, are as follows: SWMFB Tariff No. 25-B, effective July 29, 1951; Motor Freight Circular No. 4567, increasing rates in SWMFB Tariff 25-B by 8% which was adopted by the Railroad Commission on October 1, 1952; Supplement No. 28 to SWMFB Tariff No. 25-B, effective October 10, 1952, putting into effect the increase ordered by said Motor Freight Circular No. 4567; SWMFB Tariff No. 25-C, effective November 10, 1952; SWMFB Tariff No. 25-D, effective September 21, 1954; SWMFB Tariff No. 25-E, effective October 10, 1955; Motor Freight Circular No. 7218, dated July 26, 1956, amending SWMFB Tariff No. 25-E by increasing class rates 6%; Supplement No. 18 to SWMFB Tariff No. 25-E, effective August 15, 1956, putting into effect the rate increase ordered in Motor Freight Circular No. 7218; Motor Freight Circular No. 4028, dated January 31, 1951, wherein the Railroad Commission adopted National Motor Freight Classification No. 11; National Motor Freight Classification No. 11, effective March 6, 1951; Motor Freight Circular No. 5044, dated October 14, 1953, wherein the Railroad Commission adopted National Motor Freight Classification No. 12: National Motor Freight Classification No. 12, effective October 15, 1953; Motor Freight Circular No. 6711, dated June 21, 1955, wherein the Railroad Commission adopted National Motor Freight Classification No. 13; and National Motor Freight Classification No. 13, effective July 7, 1955. Each tariff of the SWMFB Tariff No. 25 Series, above referred to, provided on its face that the rates provided for in said tariff are applicable to 'common carrier motor carriers and as a minimum by contract motor carriers' and showed on its face that it was to be used in connection with the appropriate National Motor Freight Classification. The orders of the Railroad Commission, the tariffs and the classifications set forth in this paragraph clearly show the intention of the Railroad Commission that said tariffs and classifications should fix the rates for common

carriers and as a minimum for contract carriers. Thus beginning with Motor Freight Circular No. 2732, issued by the Railroad Commission on December 6, 1943, the Railroad Commission provided that the minimum rates to be charged by contract carriers would be either the common carrier rates provided in the tariffs or the class rates as specified in the motor freight classifications. Therefore, at the time the Railroad Commission issued the permit to Cage and continuously thereafter during the Cage and Corder operations under the contract carrier permits, the Railroad Commission had in effect orders approving and adopting tariffs and classifications which were applicable to common carrier motor carriers and to contract carriers as minimum charges covering volume shipments such as those which were transported by Cage and Corder for Dickey.

"Considering the statutory duty of the Railroad Commission to prescribe rates for contract carriers and the practice of fixing the rates prescribed for common carrier motor carriers as the minimum rates to be charged by contract carriers followed by the Railroad Commission for a number of years prior to the issuance of the contract carrier permit to Cage, I find and conclude that the Railroad Commission in compliance with its statutory duty prescribed the minimum rates to be charged by Cage and then by Corder for the transportation of Dickey's clay pipe within the State of Texas, and that such minimum rates so prescribed were the rates prescribed or fixed in the SWMFB Tariff No. 25 Series and the National Motor Freight Classifications that were in effect at the time of the various shipments of Dickey's pipe transported by Cage and then by Corder. To conclude and hold otherwise would be to ignore the finding of the Railroad Commission to the effect that the services rendered Dickey by Cage and then by Corder were substantially similar to that of a common carrier motor carrier and the order of the Railroad Commission that the minimum rate to be charged by

Cage and then by Corder should not be less than that charged by common carrier motor carriers under the rates fixed by the Railroad Commission.

"The tariffs of the SWMFB Tariff No. 25 Series that were in effect between March 2, 1954 and November 2, 1956, were Nos. 25-B, 25-C, 25-D and 25-E. The National Motor Freight Classifications in effect during the same period of time were Nos. 11, 12 and 13. Each of the National Motor Freight Classifications last mentioned provides a classification applicable to clay pipe and fittings such as that transported by Corder for Dickey. It is relatively easy for a person experienced in rate matters to take the applicable tariff, together with the applicable classification, and determine the rate that should be charged for a shipment of a given commodity between given points."

Appellant insists that the district court erred in basing its conclusions on what was printed on the face of tariffs by the publishing agents, which have no effect unless they correctly conform with Commission orders. The district court had, however, pointed to the various Motor Freight Circulars, including Circular No. 3361 effective March 1, 1959, which specifically approves Texas Tariff No. 25 "as minimum for contract motor carriers."

Thereafter on January 31, 1951, the Commission by its Motor Freight Circular No. 4028 made the following order:

"It is further ordered that National Motor Freight Classification No. 11, R.C.T. No. 1, *be and the same is hereby approved for application to and observance on Texas intrastate traffic;* provided that in the application thereof our outstanding rules relating to classification exceptions, application of commodity rates, etc., shall be observed."

The classifications set out sewer clay pipe as one of the items (Item 28360) and designate the class rate to be applied to volume shipments of such pipe.

By its Motor Freight Circular 4567, the Commission approved and adopted the rates in Tariff 25-B as amended effective October 10, 1952. By its Motor Freight Circular No. 7218, the Commission approved and adopted the amended rates in Supplement No. 18 to Tariff 25-E effective August 11, 1956, and continuing in effect until after November 2, 1956, when Corder ceased hauling as a contract carrier. We think that there was authority in the orders of the Commission for the class rates set out in the Tariff No. 25 Series on which the judgment of the district court is based. On the other hand, there is nothing in any of the orders prescribing rates to be charged by specialized motor carriers to indicate that those rates would apply to contract carriers. We conclude that the district court properly held that the Commission's order in the permit issued to Corder "that the minimum rate to be charged by applicant shall not be less than that charged by common carrier motor carriers under the rates fixed by the Railroad Commission" must be given legal effect by referring to the rates fixed by the Tariff No. 25 Series.

As to the applicable statute of limitations, the district court said:

> "Dickey contends that a substantial part of Corder's claim made herein is barred by Article 5526, Vernon's Civil Statutes of Texas, Annotated, the Texas two-year statute of limitation. That statute, by its express terms, applies only to actions for debts not evidenced by a

contract in writing. In the instant case there was a contract in writing entered into by and between Dickey and Cage, which was later assigned and transferred to Corder, and there was a subsequent contract in writing between Corder and Dickey. It was under those contracts, each of which is hereinabove referred to, that Corder performed the services forming the basis of his claim made in this action, namely, the transporting of Dickey's clay pipe by motor truck. While it is true that the Cage-Dickey contract and the Corder-Dickey contract, and each of them, provided, in effect, that the sole compensation to be paid by Dickey for the transportation of its clay pipe was to be the rate charged by rail carriers, there was an implied obligation on the part of Dickey growing out of the contract to pay such rate as was fixed by the Railroad Commission, and, as above pointed out, that duty could not be changed by contract. Furthermore, as hereinabove pointed out, both the Cage and the Corder contracts contained the provision to the effect that the carrier (Cage, then Corder) would comply with all lawful rules, regulations and orders required of a contract carrier by the Railroad Commission. Therefore, I find and conclude that Corder's claim comes within Article 5527, Vernon's Civil Statutes of Texas, Annotated, the four-year statute of limitation, and that no part of his claim is barred by the two-year statute of limitation. Steele v. General Mills, supra [329 U. S. 433]."

The Texas two-year statute of limitations applies to "actions for debt where the indebtedness is not evidenced by a contract in writing." Vernon's Civil Statutes of Texas, Article 5526, subd. 4. A four-year statute of limitations applies to "action for debt where the indebtedness is evidenced by or founded upon any contract in writing." Vernon's Civil Statutes of Texas, Article 5527, subd. 1.

Appellant calls attention that the only case cited by the district court as authority for holding that the four-year statute was applicable is *Steele v. General Mills*, 1947, 329 U. S. 433, 438, reversing *General Mills v. Steele*, 5 Cir., 1946, 154 F. 2d 367. In that case the action was brought on the legal contract filed with the Railroad Commission, and not on an illegal amendment entered into some eleven months later providing a lower and different basis of rates. The appellant thus presents cogent reasons for distinguishing the *Steele* case.

The appellant insists that Corder's claim is based on the statutory liability of Article 911b, Sec. 6-aa, quoted supra p. 6, which makes it the duty of the Commission to prescribe minimum rates for contract carriers. As the district court pointed out, however, both the Cage and the Corder contracts themselves contained the provision to the effect that the carrier would comply with all lawful rules, regulations and orders required of a contract carrier by the Railroad Commission.[2] That provision would control over any agreement the effect of which would be to pay less than legal rates. Since Corder's obligation to charge and Dickey's obligation to pay the rates fixed by the Railroad Commission were thus expressly evidenced by and founded upon the written contracts, we are not called in to decide the troublesome question of which statute of limitations

[2] Each contract provided:

"Carrier agrees at his cost to obtain all necessary permits and comply with all lawful rules, regulations and orders required of a contract carrier by the Railroad Commission of the State of Texas or any other governing body who may have lawful authority over such contract carriers."

would apply to an obligation which can only be implied from a written contract. We agree with the district court that the Texas two-year statute of limitations was not applicable.

The judgment rendered was based on charges shown in Plaintiff's Exhibit 26, consisting of some 155 closely typed, legal-size pages. Corder's rate expert, Mr. Burch, testified that he knew of no corrections that should be made in Exhibit 26, other than certain changes which he had made, and that that exhibit disclosed the correct figure of the amount owed. On motion for new trial Dickey pointed out numerous claimed discrepancies between the rates shown in Plaintiff's Exhibit 26.[3] Without discussing the claimed errors, the district court simply overruled Dickey's motion for new trial. Appellee insists that the claimed corrections came too late on motion for new trial. Many of the claimed errors were pointed out in detail on pages 36-40, inclusive, of Dickey's original brief in the district court filed on May

[3]Ground 3 of Dickey's motion for new trial reads:

"The Court erred in holding (Sheets 16, 19 and 20) that Plaintiff's Exhibit 26 shows the correct weights and correct SWFMB Tariff 25 Series charges on the Dickey shipments transported by Corder during the period indicated.

"Comment: After making the weight corrections listed on Sheets 17, 18 and 19, there are 20 other instances where erroneous weights are shown in Plaintiff's Ex. 26 and there are 32 other instances where correct weights are shown but the charges are based on incorrect weights. See Defendant's original brief, pages 36 and 37. The most serious discrepancy in Ex. P-26 results from the use of erroneous rates. All rates in SWMFB Tariff 25-E were increased 6 per cent on August 11, 1956 (Plaintiff's Exhibits 42b and 43). But Witness Burch used identically the same rates to each destination before and after that date. Obviously the rates during the period through August 10, 1956, or the rates after that date are wrong. To illustrate, if the rate to El Paso on and after August 11, 1956, was 135 cents, it was only 127 prior to that date (135 divided by 106 per cent). Plaintiff's Ex. 25 shows the rate to be 128 cents. Other obvious rate errors are cited on pages 39-40, Defendant's original brief. If the Commission prescribed SWMFB Tariff 25 Series rates on those shipments as Plaintiff contends, the charges shown in Exhibit P-26 are overstated by thousands of dollars."

22, 1961, about two and a half months after the close of the evidence but three months before the judgment was rendered. The nature of these claimed errors appears to be such that they could be either established or disproved with almost mathematical certainty. Substantial justice would be more nearly accomplished, we think, if the district court treated each of the claimed errors on its merits. See *Farrell v. Trailmobile, Inc.*, 5 Cir., 1955, 223 F. 2d 697, 698; *Serio v. Badger Mutual Ins. Co.*, 5 Cir., 1959, 266 F. 2d 418, 421. In order to permit that to be done, and without indicating any view as to whether any of the claimed errors were in fact errors, the judgment is vacated insofar only as it overruled the defendant's motion for new trial, and the cause is remanded for a consideration of Ground 3 of the motion for new trial on its merits. The costs of appeal are taxed two thirds against the Appellant and one third against the appellee.

JUDGMENT OVERRULING MOTION FOR NEW TRIAL VACATED AND CAUSE REMANDED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ CLARA R. JAMES
Deputy
New Orleans, Louisiana JAN 28 1963
[SEAL]

No. 19364

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated insofar only as it overruled the defendant's motion for new trial, and that this cause be, and it is hereby, remanded to the said District Court for a consideration of Ground 3 of the motion for new trial on its merits;

It is further ordered and adjudged that the appellant, W. S. Dickey Clay Manufacturing Company, be condemned to pay two-thirds of the costs of this cause in this Court, and that the appellee, William H. Corder d/b/a W. H. C. Trucking Company, be condemned to pay one-third of the costs in this Court, for all of which execution may be issued out of the said District Court.

November 30, 1962

Issued:

No. 19364

ORDER DENYING PETITIONS FOR REHEARING

January 15, 1963.

ON PETITIONS FOR REHEARING

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by the appellant and the petition for rehearing filed by the appellee in the above-styled cause are each hereby

DENIED.

No. 19364

FIRST STAY OF MANDATE

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the

date of this order, unless the above mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 24th day of January, 1963.

/s/ RICHARD T. RIVES
United States Circuit Judge.

(Original Filed—January 28, 1963)

No. 19364

SECOND STAY OF MANDATE

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a further stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is further stayed to and including April 10, 1963, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ RICHARD T. RIVES
UNITED STATES CIRCUIT JUDGE

Dated:

(Original filed—February 20, 1963)

Article 6418, Vernon's Texas Statutes, Volume 18.

The Commission shall:

1. Adopt all necessary rates, charges and regulations, to govern and regulate freight and passenger traffic, to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger traffic on the different railroads in this State.

2. Fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this State into such general and special classes or subdivisions as may be found necessary and expedient.

3. Fix to each class or subdivision of freight a reasonable rate for each railroad subject to this title for the transportation of each of said classes and subdivisions. Such classifications shall apply to and be the same for all railroads subject to the provisions of this chapter. It may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines if found necessary to do justice, and may make rates for express companies different from the rates fixed by railroads.

4. Fix and establish for all or any connecting lines of railroads of this State reasonable joint rates of freight charges for the various classes of freight and cars that may pass over two or more such lines of such railroads.

Article 911b, Vernon's Texas Statutes, Volume 2.

Section 1. When used in this Act unless expressly stated otherwise:

(b) The term "Commission" means the Railroad Commission of the State of Texas.

(g) The term "motor carrier" means any person, firm, corporation, company, co-partnership, association or joint stock association, and their lessees, receivers or trustees appointed by any Court whatsoever owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term "motor carrier" as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns.

(h) The term "contract carrier" means any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, sec. 1.

(i) "Specialized motor carrier" means any person owning, controlling, managing, operating, or causing to be operated any motor-propelled vehicle used in transporting, over any public highway in this State, over irregular routes on irregular schedules, for compensation and for the general public with specialized equipment, property requiring specialized

equipment in the transportation and handling thereof; provided, that the term "specialized motor carrier" as used in this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns; and, provided further the term "specialized motor carrier" as used herein shall include those carriers who engage or desire to engage exclusively in the transportation of livestock, livestock feedstuff, grain, farm machinery, timber in its natural state, milk, wool, mohair, or property requiring specialized equipment as that term is hereinafter defined, or any one, or more, of the foregoing named commodities.

For the purpose of this Act, the term "specialized equipment" includes, but is not limited to block and tackle, hoists, cranes, windlasses, gin poles, winches, special motor vehicles, and such other devices as are necessary for the safe and proper loading or unloading of property requiring specialized equipment for the transportation and handling thereof.

For the purpose of this Act, the term "property requiring specialized equipment" is limited to (1) oil field equipment, (2) household goods and used office furniture and equipment, (3) pipe used in the construction and maintenance of water lines and pipe lines, and (4) commodities which by reason of length, width, weight, height, size, or other physical characteristic require the use of special devices, facilities, or equipment for their loading, unloading, and transportation.

For the purpose of this Act, the term "oil field equipment" means and includes machinery, materials, and equipment incidental to or used in the construction, operation, and maintenance of facilities which are used for the discovery,

production, and processing of natural gas and petroleum, and such machinery, materials, and equipment when used in the construction and maintenance of pipe lines. Added Acts 1941, 47th Leg., p. 713, ch. 442, Sec. 2.

Declaration of Policy. It is hereby declared to be the policy of the Legislature to create a class of common carrier motor carriers designated as "specialized motor carriers" to engage in the business of transporting for compensation or hire over the highways in this State over irregular routes on irregular schedules with "specialized equipment," oil field equipment, household goods, and used office furniture and equipment, livestock, milk, livestock feedstuff, grain, farm machinery, timber in its natural state, wool, mohair, pipe used in the construction and maintenance of water lines and pipe lines, and in addition, all commodities which by reason of length, width, weight, height, size or other physical characteristic, require the use of special devices, facilities, or equipment for their loading or unloading, and all commodities which require special facilities or special motor vehicles for adequate, efficient, or safe transportation; to regulate such carriers in the public interest to the end that the highways may be rendered safer for the use of the general public, that the wear of such highways may be reduced, that congestion of traffic on the highways may be minimized, and that the use of the highways may be restricted to the extent required by the necessity of the general public; provide regulation for all common carriers, without unjust discriminations, undue preferences or advantages, unfair or destructive competitive practices; improve the relations between and coordinate

transportation by the regulation of such motor carriers and other common carriers; preserve the common carriers serving the public in the transportation of commodities generally over regular routes; develop and preserve a complete transportation system properly adapted to the needs of the commerce of this State and of the National Defense Program. (P. 701)

Sec. 4. (a) The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provisions herein contained, to prescribe all rules and regulations necessary for the government of motor carriers, to prescribe rules and regulations for the safety of operations of each of such motor carriers, to require the filing of such monthly, annual or other reports and other data of motor carriers as the Commission may deem necessary, to prescribe the schedules and services of motor carriers operating as common carriers, and to supervise and regulate motor carriers in all matters affecting the relationship between such carriers and the shipping public whether herein specifically mentioned or not. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 4.

Sec. 6-aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the high-

ways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service. Added Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 6.

Articles 5526 and 5527, Vernon's Texas Statutes, Volume 16A.

Art. 5526. Actions to be commenced in two years

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

Art. 5527. What actions barred in four years

There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

ORDERS ISSUED BY
RAILROAD COMMISSION OF TEXAS
(RATE DIVISION)

Plaintiff's Exhibit No. 34

MOTOR FREIGHT CIRCULAR NO. 3363

Adopting Southwestern Motor Freight Bureau, Inc., Texas Tariff No. 25, and canceling Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1-A.

DOCKET NO. 6587-T

MOTOR FREIGHT CLASS AND COMMODITY TARIFF NO. 1-A — Cancelation and revision of various items and reissue of.

Austin, Texas, January 12, 1949.

Pursuant to hearing in the above numbered and entitled cause we approved, with certain exceptions, application herein as provided in Motor Freight Circular No. 3297 of August 12, 1948.

As heretofore stated, an agency of the common carrier motor carriers will issue a tariff embodying the provisions of our Motor Freight Class and Commodity Tariff No. 1-A, to be supplemented from time to time as changes therein may be made by our orders.

In Motor Freight Circular No. 3297 we stated:

"We will not at this time enter an order in this proceeding as it will be the purpose of the Common Carrier Motor Freight Association to submit a galley-proof of

the tariff to us for check and approval, after which an order adopting same and fixing an effective date will be issued."

Proof of the proposed tariff, to be designated as Southwestern Motor Freight Bureau, Inc., Texas Tariff No. 25, has been submitted and as said proposed tariff appears to conform to our previous findings and conclusions herein;

It is ordered by the Railroad Commission of Texas that Southwestern Motor Freight Bureau, Inc., Texas Tariff No. 25, issued by J. D. Hughett, Agent, naming rates, rules and regulations governing the transportation of property by common carrier motor carriers, and as minimum for contract motor carriers, be, and the same is hereby approved and adopted for application intrastate in Texas as provided therein.

It is further ordered that Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1-A, be, and the same is hereby canceled.

The terms of this order shall become effective March 1, 1949.

RAILROAD COMMISSION OF TEXAS
By W. J. Murray, Jr.
Chairman
ERNEST O. THOMPSON
OLIN CULBERSON
Commissioners

ATTEST:
K. C. MILLER
Secretary
(SEAL)

Defendant's Exhibit No. 10

MOTOR FREIGHT CIRCULAR NO. 3641

Amending Motor Freight Commodity Tariff No. 6-C

DOCKET NO. 7106-T

PIPE, VITRIFIED CLAY — Petition of Healy Motor Lines to establish volume rates on.

Austin, Texas, November 3, 1949.

Public hearing having been held in the above numbered and entitled cause pursuant to notice duly given, and the evidence there presented having been considered, and based thereon, we are of opinion and find that the application herein has been justified and should be granted, and it is so ordered.

It is further ordered that Railroad Commission of Texas Motor Freight Commodity Tariff No. 6-C be, and the same is hereby amended as follows:

Amend Item No. 78 to provide that the rates and provisions thereof applicable on tongue and groove, and bell and spigot concrete pipe will also apply on tongue and groove, and bell and spigot vitrified clay pipe when transported by Healy Motor Lines and when for the purposes provided in Note of said item.

Effective November 12, 1949.

RAILROAD COMMISSION OF TEXAS

BY OLIN CULBERSON
ERNEST O. THOMPSON
Commissioners

ATTEST:
O. D. HYNDMAN
Secretary
(SEAL)

NOTE: The concrete pipe rates referred to in the foregoing order were prescribed in M. F. Circular 3565 (Defendant's Exhibit 10) and are set forth in the following schedule:

Rates in dollars per ton, minimum weight 25,000 lbs.

Distance	*Col. 1*	*Col. 2*	*Distance*	*Col. 1*	*Col. 2*
10	$ .82	$ 1.30	260	$ 8.30	$ 8.78
20	1.26	1.73	270	8.63	9.10
30	1.63	2.11	280	8.93	9.39
40	1.97	2.45	290	9.23	9.70
50	2.27	2.76	300	9.54	10.00
60	2.62	3.09	310	9.84	10.30
70	2.85	3.33	320	10.14	10.59
80	3.14	3.62	330	10.44	10.89
90	3.36	3.84	340	10.74	11.20
100	3.62	4.11	350	11.04	11.52
110	3.91	4.29	360	11.35	11.82
120	4.05	4.52	370	11.66	12.11
130	4.35	4.82	380	11.97	12.40
140	4.65	5.13	390	12.28	12.70
150	4.95	5.43	400	12.58	13.00
160	5.26	5.74	410	12.81	13.24
170	5.56	6.03	420	13.04	13.47
180	5.87	6.35	430	13.27	13.71
190	6.18	6.64	440	13.50	13.95
200	6.49	6.95	450	13.73	14.18
210	6.78	7.25	460	14.10	14.56
220	7.10	7.56	470	14.47	14.95
230	7.38	7.87	480	14.84	15.33
240	7.70	8.18	490	15.21	15.72
250	8.00	8.49	500	15.57	16.10

Explanation of Columns: Col. 1 applies on tongue and groove pipe
Col. 2 applies on bell and spigot pipe

Plaintiff's Exhibit No. 44-b

MOTOR FREIGHT CIRCULAR NO. 4028.
Adopting National Motor Freight Classification
No. 11.

DOCKET NO. 7574-T.

CLASSIFICATION CHANGES—Application for authority to apply National Motor Freight Classification No. 11, R.C.T. No. 1, on Texas intrastate traffic.

Austin, Texas, January 31, 1951.

Public hearing having been held in the above numbered and entitled cause, pursuant to notice duly given, and having considered the evidence there presented, and based thereon, we are of opinion and find that the application herein (F. G. Freund, Agent, No. 99) has been justified, and should be granted, and it is so ordered.

It is further ordered that National Motor Freight Classification No. 11, R. C. T. No. 1, be and the same is hereby approved for application to and observance on Texas intrastate traffic; provided that in the application thereof our outstanding rules relating to classification exceptions, application of commodity rates, etc. shall be observed.

Effective as provided in the said Classification No. 11.

RAILROAD COMMISSION OF TEXAS
By OLIN CULBERSON
Chairman
W. J. MURRAY, JR.
Commissioners

ATTEST:
O. D. HYNDMAN
Secretary
(SEAL)

Plaintiff's Exhibit No. 3

Application No. 10471 Contract Carrier Permit No. 10471
Docket No. 10471

CONTRACT CARRIER PERMIT

RAILROAD COMMISSION OF TEXAS
MOTOR TRANSPORTATION DIVISION

Austin, Texas, Oct. 24, 1949

CAGE TRUCKING COMPANY, INC., of P. O. Box 777, Corpus Christi, Texas, having complied with all the requirements of Chapter 277, Acts of the Regular Session of the Forty-second Legislature, 1931, applicable to Contract Carrier Motor Carriers and having declared an intention not to operate as a Common Carrier Motor Carrier, is entitled to and is hereby granted a permit to operate as a Contract Carrier within the State of Texas and within the territory as follows:

TO TRANSPORT:

MANUFACTURED BURNT CLAY PRODUCTS consisting solely of pipe, primarily sewer pipe, for the W. S. Dickety Clay Manufacturing Co., for the manufacturer's plant located near Saspamco, Texas, to any point in the State of Texas where shipment is destined.

THIS PERMIT is to be limited strictly to the transportation of the above described property from and to the points set out above and for the firm named only.

ALL EQUIPMENT to be operated under this permit is to be restricted exclusively to that owned by the holder of such

permit and shall not exceed the number as shown by the last equipment report.

SERVICE RENDERED BY APPLICANT is more substantially similar to that of a common carrier motor carrier and the Commission orders that the minimum rate to be charged by applicant shall not be less than that charged by common carrier motor carriers under the rates fixed by the Railroad Commission.

This permit to remain in effect from and after the date hereof, subject to the provisions of Chapter 277 Acts Regular Session of the Forty-second Legislature, 1931; the further orders of the Commission; and the rules and regulations of the Railroad Commission of Texas, heretofore prescribed or which may be hereafter prescribed under and pursuant to the authority conferred upon it by law.

RAILROAD COMMISSION OF TEXAS

Chairman.

OLIN CULBERSON
ERNEST O. THOMPSON
Commissioners.

ATTEST:
C. D. HYNDMAN
Secretary.

HWP:CWH

Plaintiff's Exhibit No. 9-b

RAILROAD COMMISSION OF TEXAS
MOTOR TRANSPORTATION DIVISION
MOTOR CARRIER DOCKET No. C-191

APPLICATION OF CAGE TRUCKING COMPANY, INC., FOR THE APPROVAL OF THE COMMISSION OF THE SALE AND TRANSFER OF CONTRACT CARRIER PERMIT NO. 10471, AND WILLIAM H. CORDER, DBA W.H.C. TRUCKING COMPANY, TO PURCHASE.

AUSTIN, TEXAS

ORDER APPROVING SALE AND TRANSFER
MAR. 6, '52

BY THE COMMISSION:

On March 4, 1952, the Railroad Commission of Texas took up for consideration the above numbered and entitled cause which was filed on February 5, 1952, and, after due and legal notice of the time and place of hearing on such application had been given to the applicant, to all interested parties, and to the public generally, such hearing was held at the Driskill Hotel in Austin, Texas, on February 26, 1952.

THE COMMISSION FINDS that the application to sell and transfer

CONTRACT CARRIER PERMIT NO. 10471

is made in good faith; that the purchase price of such certificate is $1,000.00; that the purchaser, WILLIAM H. COR-

DER, DBA W.H.C. TRUCKING COMPANY, is financially able and capable of performing and maintaining the service as authorized by such certificate; that the equipment proposed to be used in such operation by the purchaser meets the requirements of the law, and the rules and regulations of this Commission with respect to safety devices, dimensions, etc., and that the purchaser agrees to conduct such motor truck operation in the same manner as heretofore authorized. THEREFORE, after duly considering the evidence, the law, and its own rules and regulations, the Commission is of the opinion that the application to sell and transfer such certificate should be approved. ACCORDINGLY, it is

ORDERED BY THE RAILROAD COMMISSION OF TEXAS that the application of CAGE TRUCKING COMPANY, INC., for the approval of the Commission of the sale and transfer of Contract Carrier Permit No. 10471, and WILLIAM H. CORDER, DBA W.H.C. TRUCKING COMPANY, to purchase,

BE, and the same is hereby in all things APPROVED.

THE HOLDER OF THIS CERTIFICATE is hereby authorized to operate in the same manner and under the same rules and regulations as heretofore authorized under such certificate, and using in said operation the number of trucks as shown by the last equipment record.

THE COMMISSION DOES NOT in this order approve the consideration paid for such certificate by the purchaser, and it is agreed and understood and so ordered, that the approval of this sale and transfer is not to be construed as indicating

the approval of the Commission of the consideration paid or as binding it to recognize such consideration in any future proceeding affecting this Certificate.

RAILROAD COMMISSION OF TEXAS

OLIN CULBERSON
Chairman

ERNEST O. THOMPSON
Commissioner

W. J. MURRAY, JR.
Commissioner

ATTEST:

O. D. HYNDMAN
Secretary

HS:JJ

Office Supreme Court, U.S.
FILED
APR 15 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 990

W. S. DICKEY CLAY MANUFACTURING COMPANY,
Petitioner,

vs.

WILLIAM H. CORDER, D/B/A W. H. C. TRUCKING COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1962.

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Petitioner,

vs.

WILLIAM H. CORDER, D B A W. H. C. TRUCKING COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Respondent, William H. Corder, doing business as W. H. C. Trucking Company, respectfully files this brief in opposition to the petition for a writ of certiorari filed herein by petitioner, W. S. Dickey Clay Manufacturing Company.

JURISDICTIONAL GROUNDS

Respondent denies the assertions in the first paragraph under the above heading in the petition for certiorari, page 2, except the statement that federal statutes are not involved.

The Court of Appeals decided the state questions involved in this case in complete conformity with the Texas statutes and the construction of those statutes by the Texas courts and by the Supreme Court of the United States. The decision recognizes and carefully conforms to long established state policy requiring that contract motor carriers charge at least the minimum rates prescribed by the Texas Railroad Commission. This policy, observed by the decision of the Court of Appeals, is essential to the integrity of the Texas transportation regulatory system, as this Court has recognized in *Steele* v. *General Mills*, 329 U.S. 433.

QUESTIONS PRESENTED FOR REVIEW

Respondent denies that petitioner has correctly stated the questions presented for review. As is apparent from the opinions of both of the lower courts, the questions decided in this case are quite different from the statement in the petition for writ of certiorari, pages 2-3.

1. This case does not present any question relating to the right, if any, of a carrier and a shipper to agree upon rates to be charged in the *absence* of orders of the Railroad Commission prescribing applicable rates. On the contrary, the record shows that the Railroad Commission at all relevant times *had* prescribed minimum rates

for the services rendered by Corder in transporting clay pipe for Dickey, and both of the lower courts so found. The decision was that the shipper and the carrier could not by contract fix rates lower than the minimum rates which the Railroad Commission had prescribed.

2. The case does not involve the broad question of failure of consideration as affecting the enforceability of written contracts. Both lower courts held that the express agreement in the contracts between Corder and Dickey to comply with all lawful orders of the Railroad Commission was controlling and could be enforced by Corder, notwithstanding inconsistent provisions that rates would be charged which were lower than the minimum rates fixed by the orders of the Railroad Commission.

3. The case does not involve the question whether the Texas two year statute of limitations is applicable to a suit for "additional freight charges not founded on a contract in writing." Both of the lower courts held that the suit in this case *is* founded on contracts in writing. The transportation services were rendered by Corder for Dickey under written contracts. The District Court held that the suit came under the four year statute because it was founded upon the express provision of the written contracts that the carrier would comply with all lawful orders of the Railroad Commission, and also on the obligation implied as a matter of law from the written contracts for transportation services that lawful rates would be charged for such services. The Court of Appeals approved the first holding that the suit was founded on the express provision of the written contracts and found it unnecessary to pass on the question whether actions on obligations implied as a matter of law from written contracts would come under the limitation statute applicable to actions founded on contracts in writing.

4. The case does not involve any rates or regulations which were merely published by carriers without being prescribed by the Railroad Commission of Texas. On the contrary, the record shows and the courts below found that the Railroad Commission of Texas had consistently performed its statutory duty of prescribing minimum rates for contract motor carriers, including rates for the services performed by Corder for Dickey.

STATEMENT OF THE CASE

Petitioner's statement of the case is in important respects inaccurate and omits significant facts. Respondent therefore submits the following brief statement:

Contracts and Permits under Which Corder Operated

Corder transported clay pipe for Dickey by truck in volume quantities from March 3, 1952, to November 2, 1956, originally as the assignee of Cage Trucking Company, under a contract which Cage had made with Dickey on July 12, 1949. (Plaintiff's Exhibit 1, R., 49) Dickey's contract with Cage provided that Cage would charge rail carload rates for such services. The contract also provided, however, that Cage would comply with all lawful rules, regulations, and orders required of a contract motor carrier by the Railroad Commission of Texas. (R. 52) In order to transport pipe under the contract with Dickey, Cage applied for and obtained from the Railroad Commission a permit to operate as a contract motor carrier. The order granting the Cage permit and the permit itself both contained the express provision that "the minimum rate to be charged by applicant shall not be less than that charged by common carrier motor carriers under the rates fixed by the Railroad Commission." (Plaintiff's Exhibits 2 and 3, R., 54, 58)

In order to operate as assignee of Cage, Corder applied to the Railroad Commission for approval of the sale and transfer of the permit from Cage to him. By order entered on March 4, 1952, the Railroad Commission approved the sale and issued a permit to Corder. (Plaintiff's Exhibit 9, R., 66) The Corder permit contained the identical language contained in the Cage permit, by which the Commission found that the service rendered by applicant was "more substantially similar to that of a common carrier motor carrier" and ordered that "the minimum rate to be charged by the applicant shall not be less than that charged by common carrier motor carriers under the rates fixed by the Railroad Commission." (Plaintiff's Exhibit 10b, R., 13-14, 93).

On or about June 1, 1954, Corder made a new contract with Dickey, which continued to provide for charges based on rail carload rates, but also contained the provision that Corder would comply with all the lawful rules, regulations, and orders required of a contract carrier by the Railroad Commission. (Plaintiff's Exhibit 15, R., 17-18, 115)

The Railroad Commission's Construction of Its Orders by Its Chief Rate Inspector

On November 1, 1956, the Chief Rate Inspector of the Railroad Commission of Texas inspected Corder's records and informed Corder that he was not charging the correct rates. On the next day, the Chief Rate Inspector also wrote to the General Manager of Dickey's San Antonio plant, advising him that the position of the Railroad Commission was that the rates which should have been charged by Corder for service rendered in transporting Dickey's pipe were the rates prescribed in Tariff 25 E, which was the tariff fixing the rates for common

carrier motor carriers for similar services. (Plaintiff's Exhibit 19, R., 69)

On November 14, 1956, the Chief Rate Inspector of the Railroad Commission filed three criminal complaints against Corder and also three complaints against Dickey's manager in the Justice Court in Travis County, Texas, for failing to comply with the rules and regulations of the Railroad Commission, in that Corder had not charged and Dickey had not paid the rates fixed by the Railroad Commission under Tariff 25 E. Both Corder and Dickey's manager were found guilty as charged and paid fines under these complaints, the manager's fine being paid with a Dickey check. (R., 129)

Thereafter, Corder submitted to Dickey a claim for the difference between the rates charged and collected and the rates which should have been charged under the Tariff 25 Series, according to the interpretation of the Railroad Commission's orders by its Chief Rate Inspector. (R., 130) Dickey refused to pay these undercharges, and this suit resulted.

The Parties' Contentions

Corder's position in this litigation is (1) that the specific orders and permits under which he was transporting clay pipe for Dickey required that he should charge for his services not less than the rates fixed by the Railroad Commission for similar services by common carrier motor carriers, (2) that the Railroad Commission during the time Corder was rendering such transportation services for Dickey had fixed rates to be charged by common carrier motor carriers for similar services, and (3) that the applicable tariffs and classifications prescribed by the Railroad Commission for common carrier motor carriers and as

a minimum for contract carriers, were the Tariff 25 Series and the National Motor Freight Classifications in effect at the relevant times.

On the other hand, Dickey contends that the provisions in the orders and permits under which Corder was operating were "meaningless" (Petition, 12) because Dickey claims that the Railroad Commission had not prescribed any rates for similar services to be performed by common carrier motor carriers, and therefore that the parties were free to contract for any rates that they pleased. As an alternative contention, Dickey has at times asserted that if any rates were prescribed, they were not the rates fixed for common carrier motor carriers, but the lower rates fixed for specialized motor carriers. (Petition, 12) However, it is admitted (Petition, 9), as is evident from the orders themselves (Petition, 53), that in fixing rates for specialized motor carriers the Railroad Commission made no provision that such rates should be applied as a minimum by contract motor carriers. The Commission, on the other hand, did so provide in orders relating to common carrier motor carriers. (Petition, 51-52)

The Statutes and the Railroad Commission Orders

In order to resolve these issues between the parties, it was necessary for the District Court and the Court of Appeals to examine the relevant Texas statutes and to consider the numerous orders of the Railroad Commission promulgated under those statutes, which prescribed the rates which shall be charged by the three classes of motor carriers, namely, (1) common carrier motor carriers, (2) specialized motor carriers, and (3) contract motor carriers.

The District Court in its opinion carefully reviewed the statutory history (R., 407-409) and also reviewed the

Railroad Commission's orders (R., 409-415) under which the Railroad Commission has prescribed rates for common carrier motor carriers and contract motor carriers, including the transportation of freight in truckload or volume quantities. The orders of the Commission show that since 1931, when contract motor carriers were designated as a separate class by statute, the Railroad Commission has repeatedly provided by its orders that the rates prescribed in the tariffs for common carrier motor carriers shall be the minimum rates to be charged by contract motor carriers for similar services.

The conclusion of the District Court, approved and quoted by the Court of Appeals (R., 465-475), was that the Railroad Commission had performed its statutory duty in prescribing minimum rates to be charged by Corder as a contract motor carrier and that such minimum rates were the rates fixed by the Tariff 25 Series and the National Motor Freight Classifications in effect at the time the various shipments of Dickey's pipe were transported by Corder. Both courts concluded that to hold otherwise would be to ignore the findings of the Railroad Commission to the effect that the services rendered by Corder were substantially similar to those of common carrier motor carriers and that the minimum rate to be charged by Corder would be not less than the rate fixed for common carrier motor carriers by the Railroad Commission. (R., 414, 473)

The opinions below show on their face that the issues of fact were thoroughly and carefully considered. The petition for certiorari simply contains unsupported assertions contrary to the findings and conclusions of the lower courts. Believing that nearly all of the arguments in the petition for certiorari are demonstrated to be unsound by the opinion of the Court of Appeals, we will not repeat

what is said in that opinion and we will refer to only two of Dickey's assertions that might be confusing if they were not answered here.

On page 7 of the petition for certiorari Dickey says that on June 6, 1941, the Texas Attorney General ruled that "common carriers" referred to in Article 911b, Section 6-aa, Vernon's Texas Civil Statutes,* included rail carriers as well as common carrier motor carriers. While petitioner says nothing more about this subject, the Court might infer that the 1941 ruling of the Texas Attorney General is recognized law in Texas. The record shows, however, that while for a brief time in 1943 the Railroad Commission attempted to require rail carload rates to be charged by contract motor carriers for truckload shipments, such orders were enjoined by the State District Court in Travis County, Texas, on August 25, 1943 (Plaintiff's Exhibits 52, 53, R., 380-384), and the Commission, in view of the Court's judgment, on October 8, 1943, withdrew those orders. (Motor Freight Circular 2728, Defendant's Exhibit 13, R., 254, and see statements and concessions of counsel for Dickey, R., 255-257.) In 1949, when the Cage contract was made with Dickey, and at all times when Corder was hauling for Dickey, there was no lawful authority at all for a contract motor carrier to base his charges on rail carload rates.

While Dickey argues that the orders of the Railroad Commission prescribing minimum rates to be charged by

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*This statute reads as follows:

"Sec. 6-aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

Corder were "meaningless" (Petition, 12), and at various places in the petition that the rates to be charged could not be ascertained from the tariffs and classifications relied upon by the lower courts, there is really no difficulty in applying these rates and classifications. The use of the tariffs and classifications in determining the correct charges was explained by Mr. Burch, the expert witness for Corder. (R., 196-201, 207) Even Mr. Eskelin, the Traffic Manager for Dickey, had no difficulty in computing charges under the Tariff 25 Series for services which Corder had performed for Dickey, when he was requested to do so by Dickey's counsel. (R., 336, 337)

There Is No Reason to Grant Certiorari, Because the Decision of the Lower Courts Follows the Texas Statutes, the Texas Decisions, and the Decision in the Steele Case by This Court

Dickey does not deny that under the Texas statutes the duty rested upon the Railroad Commission to prescribe minimum rates to be collected by contract motor carriers at not less than the rates fixed for common carriers for substantially the same service. The lower courts have held that the Railroad Commission performed that duty. Under the decisions of the Texas courts, there is a public obligation upon the carrier to collect the rates fixed by the Railroad Commission, regardless of any private contract. *Texas & New Orleans Railroad Company* v. *Yates*, 139 Tex. 89, 161 S.W.2d 1050. This rule has been recognized and applied in *Steele* v. *General Mills*, 329 U.S. 433.

Dickey attempts to distinguish the *Steele* case because in the present case there was a finding that both parties acted in good faith in providing that the rates to be charged should be based upon rail carload rates. However, it is submitted that the same rule of public policy applies in

this case even more strongly than in the *Steele* case. In that case the carrier was charging rates lower than the lawful rates with full knowledge that he was not complying with the regulations of the Railroad Commission. In fact, in the *Steele* case, there was evidence that the shipper had been led into the execution of the illegal contract for lower rates by the carrier. (See 327 U.S., at 436) Nevertheless, the Supreme Court held that the carrier was entitled to collect the difference between the rates fixed by the Railroad Commission and the rates provided in the contract. Corder has an even stronger case for enforcing the legal rates as determined by the orders of the Railroad Commission, because it cannot be argued that Corder had any knowledge that he was charging less than the legal rates or that he had led Dickey into making an illegal agreement.

It might be argued that the Railroad Commission could more appropriately have fixed other rates (such as those prescribed for specialized motor carriers) as the minimum rates to be charged by Corder for his services rendered for Dickey. The fact remains, however, that it did not do so, and the Commission's findings and orders under settled Texas law are not subject to collateral attack. *West Texas Compress and Warehouse Company* v. *Panhandle and S. F. Ry. Co.*, (Tex. Com. App.) 15 S.W.2d 558; *Texas Steel Company* v. *Fort Worth & D. C. Ry. Co.*, 120 Tex. 597, 40 S.W.2d 78; *Railroad Commission* v. *Robcrdeau*, 150 Tex. 307, 242 S.W.2d 881.

Having found and concluded that the District Court was correct in holding that the Railroad Commission has prescribed minimum rates to be charged by Corder, the Court of Appeals certainly did not pass upon any question relating to the rights of the parties if the Commission had not prescribed any rates for the service rendered by

Corder. Nor did the Court of Appeals hold that carriers can by publication amend and revise the rates previously prescribed by the Railroad Commission. On the contrary, the Court found and held that the Tariff 25 Series and the National Motor Freight Classifications were adopted by the Railroad Commission. Revisions of the Tariff 25 Series (designated as Tariff 25, A, B, etc.) were simply published for the purpose of incorporating changes made by Railroad Commission orders. Each of the relevant National Motor Freight Classifications was specifically adopted.

The holding of both of the lower courts, we re-emphasize, is in complete conformity with established policy in Texas. On the other hand, a holding in line with the contentions made by Dickey would create a chaotic condition in the Texas regulatory system relating to motor carriers. If the Court should accept Dickey's contentions, then the inevitable result would be that in large areas of motor transportation the Commission has wholly failed to discharge its statutory duty of prescribing rates, and the carriers by agreement with the shippers could charge any rates which they pleased. This situation of course would be exactly the opposite of what the Supreme Court of the United States has held to be the regulatory system envisaged by the Texas motor transportation statutes, in *Steele v. General Mills*, 329 U.S. 433.

The recognized Texas policy would also obviously be defeated if it were held that a transportation contract is void and unenforceable in toto if there is a provision in the contract for rates less than the legal rates. The effect of such a holding, as advocated by Dickey (Petition, 17), would mean that the carrier could not collect any charges for his services at all, if the shipper chose not to pay. Nothing could more completely nullify the Texas policy

that the legal charges must be paid by the shipper and collected by the carrier in full. The holding in cases such as *City of Memphis* v. *Browder*, (Tex. Civ. App.) 4 S.W.2d 614, cited by Dickey (Petition, 17), which was reversed in *City of Memphis* v. *Browder*, (Tex. Com. App.) 12 S.W.2d 160, is simply not applicable where the paramount consideration is the enforcement of the state's policy requiring the uniform and full payment of rates prescribed by the public authority.

The holding of the lower courts that the action is founded on contracts in writing (and therefore that the four year statute of limitations applies) is likewise in accord with the holding on this point in *Steele* v. *General Mills*, 329 U.S. 433. The petitioner cites no Texas cases to the contrary. Actually the holding on the issue of limitations by both of the lower courts is fully sustained by Texas decisions. *Elder Dempster & Company* v. *St. Louis, Southwestern Railway Company*, 105 Tex. 628, 154 S.W. 975; *International Printing Pressmen & Assistants Union* v. *Smith*, 145 Tex. 399, 198 S.W.2d 729; *Texas Pacific Coal & Oil Company* v. *Stuard*, (Tex. Civ. App.) 7 S.W.2d 878 (writ refused); *Kerby* v. *Collin County*, (Tex. Civ. App.) 212 S.W.2d 494.

CONCLUSION

It is respectfully submitted that the Court of Appeals, in affirming the District Court, has carefully and correctly applied the Texas statutes, as construed by Texas decisions and by the decision of the Supreme Court of the United States in *Steele* v. *General Mills*, 329 U.S. 433. There is clearly no ground for the Court to grant a writ of certiorari in this case to correct any holding on the law. As to the findings of fact by the District Court, also affirmed by

the Court of Appeals, there is ample support in the voluminous record.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James P. Hart, an attorney for respondent, William H. Corder, certify that I have mailed copies of the foregoing brief by first class United States Mail to Mr. Carl L. Phinney, 617 First National Bank Building, Dallas 1, Texas, and to Messrs. Sam Dawkins, Jr., and Frank A. Leffingwell, 1201 Fidelity Union Tower, Dallas 1, Texas, Attorneys for Petitioner, this day of April, 1963.

.....
JAMES P. HART.

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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 990

W. S. DICKEY CLAY MANUFACTURING COMPANY,
Petitioner,

v.

WILLIAM H. CORDER, d b a W. H. C. TRUCKING COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

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Respondent.

PETITIONER'S REPLY BRIEF

W. S. Dickey Clay Manufacturing Company, petitioner herein, files the following reply to Respondent's brief in opposition to petition for writ of certiorari, not dated, received April 15, 1963.

JURISDICTIONAL GROUNDS

Respondent erred in stating that the decision conforms to long established state policy requiring that contract motor carriers charge at least the minimum rates prescribed by the Texas Railroad Commission (Page 2). The record shows that the Texas Railroad Commission has never prescribed minimum rates on clay pipe to be observed by contract motor carriers. Regular route common carrier motor carriers published a provision in their tariffs providing certain

minimum rates but they had no authority to make such publication. In Texas, the Railroad Commission of Texas has exclusive authority to initiate intrastate rates. Tariffs published by carriers have no effect unless they conform with Commission orders.

QUESTIONS PRESENTED FOR REVIEW

1. Respondent erred, page 2, in assuming that the Commission prescribed minimum rates on clay pipe for contract carriers and he cited no such order.

2. The sole consideration supporting the contract referred to by Respondent, page 3, is show in paragraph 3, page 51 of the record. Respondent now contends that consideration was illegal. The effect of failure of consideration on the enforceability of written contracts is a primary question at issue.

3. If the suit were founded on contracts in writing, the rates provided therein and subsequently paid in full would be applicable. The provision in paragraph 6, page 52 of the record was an obligation by the carrier and required it to obtain a certificate and comply with the Commission rules and regulations.

4. The finding of the lower courts, cited by Respondent on page 4, that the Commission had prescribed rates on clay pipe to be observed by contract carriers was based on tariff publication by regular route common carrier motor carriers. Respondent has cited no order prescribing such rates.

STATEMENT OF THE CASE

(a) *Contracts and Permits Under Which Corder Operated*

The new Corder contract made on or about June 1, 1954, provided for rail rates to certain destinations and higher than rail rates to other destinations (R. 321 and Plaintiff's Exhibit 15).

(b) *Railroad Commission's Construction*

Respondent erred in assuming that the statement made by its inspector reflected the Commission's construction of its orders. The Railroad Commission never approved SWMFB Tariff 25-E and it never issued any order providing that the rates named therein should be observed by contract carriers. Corder's service was not similar to the service of the regular route carriers participating in SWMFB 25-E (R. 283-286, 354). There was no trial involving the charges filed by the Rate Inspector. Corder and Dickey both paid small fines to dispose of the argument (R. 129). No one argues with a policeman.

(c) *The Parties' Contentions*

Respondent contends that the Railroad Commission of Texas has fixed rates on truckload shipments of clay pipe but he cites no order to that effect. Respondent admits, page 7, that the specialized motor carrier rates on clay pipe did not apply for contract carriers but he contends that the Rates prescribed in Circular 4028 did apply for contract carriers. That order does not so provide. See page 55,

Appendix to petition. It was issued on application of regular route common carriers and it applied only for their account.

The order referred to on pages 51-52 of the petition did not name truckload shipments of clay pipe and did not refer to it in any way.

(d) *Statutes and Railroad Commission Orders*

Respondent erred in indicating at the bottom of page 7 that specialized motor carriers are not common carriers. The Texas courts hold that specialized carriers are "common carriers". See *T&NO RR v. Thompson, 284 S. W. 2d 402, Writ of Error Refused, N.R.E.*

The only orders cited at pages 409-415 of the record, referred to on page 8 of the reply, are General Order 25, MF Circ. 2073, MF Circ. 2732 (erroneously shown as 273), and MF Circ. 3363. General Order 25 applied only to L. T. L. shipments of merchandise and has long since been obsolete (Defendant's Ex. 8). MF Circ. 2073 superseded General Order 25 and applies only to L. T. L. shipments of merchandise. MF Circ. 2732 and MF Circ. 3363 are discussed on pages 8 and 9 of our original petition. They did not affect truckload clay pipe shipments in any way. The basis for the District Court's conclusion is found in the tariffs cited on pages 412 and 413 of the record. They did not conform with the Commission's orders and have no validity under Texas statutes unless they do so conform.

Respondent states on page 9 of his reply:

> "In 1949, when the Cage contract was made with Dickey, and at all times when Corder was hauling for Dickey, there was no lawful authority at all for a contract carrier to base his charges on rail carload rates."

That is Question No. 1 here at issue. Respondent cites no authority for his position. Dickey contends that, prior to the prescription of contract carrier rates by the Railroad Commission of Texas, contract carriers may contract with shippers for any charge on which they agree. Rates are fixed by the Railroad Commission of Texas, not by statute or by carriers.

The computation by *Witness Eskelin*, referred to by Respondent on page 10 of his brief, was for the purpose of comparing charges paid with the charges accruing under RRCofT Tariff 6-D and SWMFB Tariff 25. SWMFB Tariff 25-E named the rates applicable via regular route common carriers which do not transport shipments that Dickey makes (R. 354).

(e) *Lower Courts Did Not Follow Texas Statutes*

Respondent claims, page 10, that the Railroad Commission of Texas has performed its duties and prescribed contract carrier rates on truckload shipments of clay pipe but he still does not cite any such order. In *Steele v. General Mills, 329 U. S. 433*, the Commission had prescribed rates on the merchandise there involved and that fact was admitted by all parties. Paragraph 13 of the contract involved in that case provided that the rates to be paid would be those

fixed by the Railroad Commission of Texas. In this case the Commission had not yet fixed rates to apply on clay pipe in truck loads to be observed by contract carriers and the rates contracted for between Corder and Cage are the legally applicable rates. Neither the Respondent nor the lower courts have cited any order prescribing rates on clay pipe for contract carriers. They are basing their conclusions on carrier tariffs which do not conform with orders of the Commission. The carrier has collected the lawful rates and all charges have been paid on that basis (R. 232). No collateral attack is being made on any Commission order. We attack the carrier's printed tariffs because they do not conform with the order of the Commission in MF Circ. 4028 prescribing regular route common carrier rates.

Respondent contends, page 12, that the Court of Appeals did not hold that carriers can by publication amend and revise the rates previously prescribed by the Railroad Commission of Texas but the record shows no order requiring contract carriers to observe the rates prescribed for regular route common carriers in MF Circ. 4028, page 55, Appendix to petition. The Court held that they must be observed by contract carriers because the carriers published the MF Circ. 4028 rates in a tariff providing that the rates named therein apply as minimum for contract carriers.*

Respondent further contends, page 12, that the Railroad Commission approved and adopted SWMFB Tariff 25,

*When the Railroad Commission of Texas desires to make the regular route common carrier rates applicable to contract carriers, it includes in its order a provision to that effect. See MF Circular 2732 (Plaintiff's Exhibit 30b) and page 33, Appendix to Petition. That circular, however, did not apply to clay pipe. MF Circ. 4028 contained no such provision.

SWMFB Tariff 25-A, SWMFB Tariff 25-B, etc. The only tariff approved and adopted by the Railroad Commission was Tariff 25. That action was taken after a proof copy of the tariff had been examined and found to conform with Commission orders. See MF Circ. 3363, page 51, Appendix to Petition. There were no truckload clay pipe rates in that tariff at the time Circular 3363 was issued. No truckload clay pipe rates were ever added to SWMFB Tariff 25. The first regular route common carrier truckload rates on clay pipe were prescribed in MF Circ. 4028 (Page 55), effective March 6, 1951, a year or more after SWMFB Tariff 25 had been cancelled.

Respondent contends, page 12, that SWMFB Tariff 25-A and later tariffs were published "for the purpose of incorporating changes made by the Railroad Commission orders." But the carriers did not confine the tariff changes to those made by the Commission. As to truckload shipments of clay pipe the Commission prescribed rates to be assessed by regular route common carriers only. The carriers provided in their tariffs that they should be observed as minimum by contract carriers. There was no authority in Commission orders for such a provision.

Respondent states that Dickey's contentions would permit carriers and shippers to agree on rates and charges until such time as the Commission prescribes rates on the commodity involved (page 12). That has always been true in Texas. Prior to 1891 the railroads and shippers could legally make agreements as to rates. In 1891 the Commission was given the exclusive power to initiate and prescribe all rail

rates. In 1931 the Commission was given exclusive power to initiate and prescribe contract carrier motor rates. Since that time it has prescribed contract carrier rates on a great majority of moving commodities but there are a few, including clay pipe in truckload quantities, for which it has not yet prescribed any rates. The Texas Legislature did not prescribe any rail or motor rates. It left that duty up to the Commission. Until the Commission prescribes contract carrier rates, the carrier and shipper can legally contract to observe any rates they may be able to agree on. This is in accord with the decision in *Steele v. General Mills, 329 U. S. 433.* In that case every one agreed that the Commission had acted before the contract was entered into and it provided that the Commission rates would be protected.

Respondent states, page 12, that Dickey advocated a policy which would nullify the Texas policy that the legal charges must be paid by the shipper. We agree that the legal charges must be paid but we contend that the legal charges are those provided in the contracts, since the Commission has not yet prescribed any contract carrier rates on clay pipe in truck loads.

Respondent argues, page 12, that a contract carrier could not collect any charges if the contract were held to be void because of failure of consideration. He overlooks the fact that, if the consideration clause is void because it does not provide for rates which have already been prescribed by the Commission, the contract carrier could collect the prescribed rates under the Texas statutes, just as was done in *Steele v. General Mills, 329 U. S. 433.* That is what Corder

is attempting to do here but he has failed to show that the Railroad Commission prescribed any truck load rates on clay pipe.

Respondent apparently admits, page 13, that the Texas courts hold that the failure of consideration in a written contract renders the entire contract void but he cites cases to show that the four year statute applies in connection with the collection of freight charges. None of them are in point here.

Elder Dempster & Co. v. St. Louis Southwestern Railway Company, 154 S. W. 975, involved the sole issue as to whether a bill of lading is a written contract. The supreme court held that it is a written contract and that the four year statute applies. Corder did not issue any bills of lading.

International Printing Pressmen & Assistants' Union v. Smith, 198 S. W. 2d 729, involved a suit for wrongful expulsion from a Union under its constitution and bylaws. Corder has alleged no breach of any contract.

Texas Pacific Coal & Oil Company v. Stuard, 7 S. W. 2d 878 (*writ refused*), involved the question as to whether express oral agreements, made contemporaneously with and in addition to a written lease contract, supersede implications of such contract. There were no oral, contemporaneous agreements between Corder and Dickey.

Kerby v. Collin County, 212 S. W. 2d 494, held that the minutes of the County Commissioners Court, showing the employment of Mrs. Kerby and her acceptance as County

Treasurer, was a sufficient writing to bring the matter within the four year statute, Article 5527, page 50, Appendix to petition.

We respectfully submit that a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Frank A. Leffingwell, an attorney of record for petitioner, do hereby certify that I have this day served copies of the foregoing reply on attorneys for Corder by sending by first class U. S. Mail:

2 copies to Mr. James F. Gardner, Petroleum Center, B-142, 900 N. E. Military Drive, San Antonio 5, Texas.

1 copy to Mr. James P. Hart, 904 Brown Building, Austin 1, Texas.

Witness my hand at Dallas, Texas, this 18th day of April, 1963.

FRANK A. LEFFINGWELL